

the exchange proceeding conducted as authorized by § 8.26 of this chapter.

(3) The Commission may deny any petition for stay which is not timely filed or which is not otherwise in accord with these rules.

(b) *Contents of petition for stay.* A petition filed under this section must state the reasons that the stay is requested and the facts relied upon, as specified in § 9.20. Averments of the petition must be supported by affidavits, other sworn statements or copies thereof, or a stipulation as to those facts which are not in dispute. Based upon the petition, the Commission, in its discretion, may order a stay of the disciplinary action or access denial action.

(c) *Response to petition.* The exchange may serve and file a written response to any petition for a stay within five days after service of the petition.

(d) *Standards for granting petition for stay.* The Commission will promptly determine whether to grant or deny a petition for stay and may act upon a petition at any time, without waiting for a response thereto. In determining whether to grant or deny the petition for stay, the Commission will consider, among other things, whether the petitioner has established:

(1) Petitioner's likelihood of success on the merits; and

(2) That denial of the stay would cause irreparable harm to the petitioner; and

(3) That granting the stay would not endanger orderly trading or otherwise cause substantial harm to the exchange or market participants; and

(4) That granting the stay would not be contrary to the Act, and the rules, regulations and orders of the Commission thereunder or otherwise contrary to the public interest.

(e) *Ex parte stays.* The Commission may act upon a petition for stay, without waiting for the exchange's response thereto only where petitioner:

(1) Expressly requests an *ex parte* stay;

(2) Files a proof of service; and

(3) Clearly establishes by affidavit that immediate and irreparable injury, loss or damage will result to the petitioner before the exchange can be heard in opposition.

Any order granting a stay prior to the filing of the exchange's reply will expire by its terms within such time after service of the Commission's ruling on the petition, not to exceed ten days, as the Commission fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the exchange consents that it may be extended for a longer period. In any case, the exchange may move for dissolution or modification of the stay, and the Commission will proceed to determine such motion as expeditiously as the ends of justice require.

[52 FR 25366, July 7, 1987; 52 FR 27286, July 20, 1987]

#### **§ 9.25 Limited participation of interested persons.**

On its own motion or upon motion of any person asserting a direct and substantial interest in the outcome of a proceeding conducted under this part, the Commission, in its discretion, may permit the limited participation by such interested person in the proceeding. A motion for leave to participate in the proceeding must identify the interest of that person and must state the reasons why participation in the proceeding by that person is desirable, and must state whether that person requests a copy of the record of the exchange proceeding to the extent permitted by section 8c(a)(2) of the Act and that such person agrees to pay the exchange reasonable fees, as provided in the rules of the exchange, for printing the copy.

[52 FR 25366, July 7, 1987, as amended at 59 FR 5701, Feb. 8, 1994]

#### **§ 9.26 Participation of Commission staff.**

Within twenty days after the receipt by the Division of Trading and Markets of the answering brief, the Division of Trading and Markets may file with the Proceedings Clerk a notice of intention to participate in the proceedings as *amicus curiae*. Within thirty days after filing the notice of intention to participate, the Division may file a brief as *amicus curiae*. Without prior leave of the Commission, the brief may not exceed thirty-five pages. The brief must

be filed and served on the appellant, exchange and any other parties to the proceeding in the manner specified by these rules. Within ten days after service of the Division's brief, any party may file a reply to the Division's brief. After the filing of the notice of intent to participate, no employee of the Division of Trading and Markets may thereafter make any communication relating to the proceeding, other than on the record of the proceeding before the Commission, to any Commissioner or Commission decisional employee.

**§§ 9.27–9.29 [Reserved]**

**Subpart D—Commission Review of Disciplinary, Access Denial or Other Adverse Action**

**§ 9.30 Scope of review.**

On review, the Commission may, in its discretion, consider *sua sponte* any issues arising from the record before it and may base its determination thereon, or limit the issues to those presented in the statement of issues in the briefs, treating those issues not raised as waived. If the Commission determines to consider any issue not raised by the parties, it may issue an order that notifies the parties of such determination and provides an opportunity for the parties to address any issue considered *sua sponte* by the Commission.

**§ 9.31 Commission review of disciplinary or access denial action on its own motion.**

(a) *Request for additional information.* Where a person disciplined or denied access has not appealed the exchange decision to the Commission, upon review of the notice specified in § 9.11, the Division of Trading and Markets may request that the exchange file with the Division the record of the exchange proceeding, or designated portions of the record, a brief statement of the evidence and testimony adduced to support the exchange's findings that a rule or rules of the exchange were violated and such recordings, transcripts and other documents applicable to the particular exchange proceeding as the Division may specify. The exchange must promptly advise the person who is the

subject of the disciplinary or access denial action of the Division's request. Within thirty days after service of the Division's request, the exchange must file the information requested with the Division and, upon request, deliver that information to the person who is the subject of the disciplinary or access denial action. Delivery and filing must be in the manner prescribed by § 9.11(c). A person subject to the disciplinary action or access denial action requesting a copy of the information furnished to the Division must, if the exchange rules so provide, agree to pay the exchange reasonable fees for printing the copy.

(b) *Review on motion of the Commission.* The Commission may institute review of an exchange disciplinary or access denial action on its own motion. Other than in extraordinary circumstances, such review will be initiated within 180 days after the Commission has received the notice of exchange action provided for in § 9.11. If the Commission should institute review on its own motion, it will issue an order permitting the person who is the subject of the disciplinary or access denial action an opportunity to file an appropriate submission, and the exchange an opportunity to file a reply thereto.

**§ 9.32 Oral argument.**

(a) *On motion of Commission.* On its own motion, the Commission may, in its discretion, hear oral argument by the parties any time before the decision of the Commission is filed with the Proceedings Clerk.

(b) *On request of party.* Any party may file with the Proceedings Clerk a request in writing for the opportunity to present oral argument before the Commission, which the Commission may, in its discretion, grant or deny. A request under this paragraph must be filed concurrently with the party's brief.

(c) *Reporting and transcription.* Oral argument before the Commission will be recorded and transcribed unless the Commission directs otherwise. In the event the Commission affords the parties the opportunity to present oral argument before the Commission, the